



Decision

Matter of: Israel Aircraft Industries, Ltd.

File: B-258229

Date: December 28, 1994

Melvin Risha, Esq., and Richard L. Larach, Esq., Sidley & Austin, for the protester.

Richard Couch, Esq., Department of the Army, for the agency. Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A contracting agency that has obtained "Greater Rights" to a technical data package (TDP) under a research and development contract that defined such rights to include "the right to use, duplicate or disclose the TDP for Governmental purposes only" may properly use the TDP in order to conduct a foreign military sale (FMS) procurement, since the FMS program has a governmental purpose.

2. Agency's decision to set procurement aside for exclusive small business participation is proper where the procurement history shows that four out of five firms that participated under the most recent acquisition for this item were small businesses, where the small business awardee performed the prior contract successfully, and where the four small business firms have all requested a copy of the current solicitation.

DECISION

Israel Aircraft Industries, Ltd. (IAI) protests the terms of request for proposals (RFP) No. DAAE07-94-R-A302, which was issued by the U.S. Army Tank-Automotive Command for the acquisition of a quantity of Mine Clearing Blade Systems (MCBS) or "mineplows," for resale under the foreign military sales (FMS) program. IAI alleges that the solicitation involves the improper release of technical data that is proprietary to IAI, and contends that the procurement should not have been set aside for exclusive small business participation.

We deny the protest.

The mineplow is a device that is attached to a battle tank, designed to detonate, extract, or push aside any mine in the path of the tank and provide a clear lane for follow-on assault forces. IAI developed a series of mineplows for a variety of tanks and, in 1987, was awarded a sole-source, research and development contract to design and develop a mineplow that was specifically adapted for the U.S. Army. That procurement was the first of three Army procurements of this item. The 1987 procurement included the delivery of several hundred mineplows and certain rights to a technical data package (TDP) intended to allow the procurement of mineplows and spare parts on a competitive basis. The TDP included sufficiently complete designs, specifications, and drawings for the MCBS to permit a contractor to manufacture the mineplows. The 1987 contract also included a non-disclosure/non-use agreement which a contractor would be required to enter in order to gain access to the TDP.

In 1990, the Army issued its first unrestricted, competitive RFP for the mineplows, under which it received offers from five firms. Of those firms, all but IAI were small business concerns. The contract was awarded to Minowitz Manufacturing, who produced the MCBS using the TDP that IAI had provided under the 1987 contract.

Notice of the current procurement, proposed RFP No. DAAE07-94-R-A302, was issued in the Commerce Business Daily (CBD) in July 1994. The CBD synopsis identified the procurement as a small business set-aside. It also informed potential contractors that in order to receive the solicitation, they would have to request and return a signed non-disclosure/non-use Agreement. Under that agreement, the contractor would agree to certain conditions or restrictions limiting its use of the TDP that would be provided with the RFP.

IAI was among the first firms to request and return the requisite forms for obtaining the RFP. When it received the RFP, it discovered that the procurement involved FMS commitments for Kuwait and Saudi Arabia. This protest followed.

IAI contends that the data rights the United States (U.S.) Government obtained under the 1987 contract do not permit the dissemination of the TDP to prospective offerors in connection with an FMS procurement and that the current RFP is therefore improper. Since other firms cannot produce the MCBS without the TDP, IAI is essentially arguing that the Army is required to procure the item from IAI because the procurement involves an FMS.

When the Army and IAI negotiated the terms of the 1987 contract, the parties were aware of the potential for MCBS procurements under the FMS program. IAI states that it had reservations about the future use of its TDP for FMS procurements, and the record shows that it initially proposed to limit the U.S. Government rights to the TDP under a "Government Purpose License Agreement." That proposed agreement specifically restricted the TDP rights to permit its use for proposal preparation and contract performance in connection with "other than FMS procurements."

However, the Army refused to accept that agreement. Instead, after extensive negotiations, the parties agreed that the U.S. Government would receive "Greater Rights" in the TDP under the contract. The contract defined that term as follows:

"For the purposes of this contract, Greater Rights includes the rights to use, duplicate, or disclose technical data, in whole or in part and in any manner, for Governmental purposes only, and to have or permit others to do so for Governmental purposes only. Greater Rights include purposes of competitive procurement but do not grant to the Government the right to have or permit others to use technical data for commercial purposes."

The contract also established milestones during performance that would eventually convert the government's Greater Rights to Unlimited Rights:

"Greater Rights in the TDP shall convert to Unlimited Rights as defined in DFAR 27.471 (May 87) the sooner of: (a) 16 years from the date of this contract; (b) delivery to the Government of 1,000 . . . MCBSs regardless of the source of manufacture. All deliveries including Government to Government Foreign Military Sales (FMS) shall count toward satisfaction of 1,000 quantity."

In addition, the contract required that, prior to any release of the TDP to third parties, the government would require the third party to enter into a non-disclosure/non-use agreement with IAI. The specific agreement was included in the contract as Attachment VII, and required the contractor to agree to use the TDP only:

¹The contract does not define "Governmental purpose," nor does this term appear in the Arms Export Control Act, the statute governing FMS. See *infra*, p. 4.

"(1) to prepare proposals in response to solicitations issued by the [U.S. Government] and (2) as required in order to perform contracts including Government-to-Government Foreign Military Sales procurements, between the [contractor] and the [U.S. Government]."

The Army's protest report and the protester's comments describe the parties' differing views of the meaning that should be given to Greater Rights. IAI asserts that its intention, during negotiations, was to limit the U.S. Government's use of the TDP to situations where the U.S. Government would be the end-user. When the Army refused to accept language in the contract that would preclude the use of the TDP in any FMS procurement, insisting that the U.S. Government had to have the ability to export from its existing stocks to other governments, IAI accepted the "Greater Rights" clause. IAI asserts that it was only agreeing to allow government-to-government FMS transfers of MCBSs from existing U.S. Government inventory.

The Army, on the other hand, asserts that the contract granted to the U.S. Government the right to use the TDP for "Governmental Purposes," and that a government-to-government FMS of the MCBS "can only be construed as a legitimate Government purpose," regardless of whether the mineplows come from existing stock or are purchased for resale.

The FMS program is governed by the Arms Export Control Act, 22 U.S.C. § 2751 et seq. (1988). This Act permits the United States to help friendly foreign countries and international organizations to purchase United States defense articles and services. Most FMS transactions by the United States are government-to-government sales, *i.e.*, the foreign government contracts with the United States to purchase United States goods and services, although certain governments are permitted to purchase goods and services directly from United States companies. See United States v. Napco International, Inc., 835 F. Supp. 493 (D. Minn. 1993). Commercial sales are distinguishable from FMS sales in that commercial sales are made directly between a private contractor and a foreign country; the sale does not go through the government-to-government channels which foreign military sales go through. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1040 (9th Cir. 1983).

We believe it is evident from the language of the Arms Export Control Act that the FMS program has a governmental, rather than a commercial, purpose. Citing the need for international defense cooperation and military export controls, the Act states that:

"[I]t remains the policy of the United States to facilitate the common defense by entering into international arrangements with friendly countries which further the objective of applying agreed resources of each country to programs and projects of cooperative exchange of data, research development, production, procurement and logistics support to achieve specific national defense requirements and objectives of mutual concern. To this end, this Act authorizes sales by the United States Government to friendly countries . . . in furtherance of the security objectives of the United States and of the purposes and principles of the United Nations Charter. 22 U.S.C. § 2751." (Emphasis added.)

This language concerning the national defense and security objectives clearly ties FMS to governmental purpose since such objectives are inherent in governmental responsibilities and obligations. See U.S. Const. art. I, § 8, granting Congress the power to provide for the common defense and general welfare of the United States.

Further, the protester's characterization of the government's involvement in this procurement as that of a transfer agent, rather than a purchaser, does not alter the governmental purpose that the FMS procurement would serve. The Executive Order covering the administration of the Act, Exec. Ord. No. 11,958 of Jan. 18, 1977, 42 Fed. Reg. 4311 (1977), as amended, provides that the Secretary of State "shall be responsible for the continuous supervision and general direction of sales and exports under the Act (22 U.S.C. §§ 2571 et seq.) . . . to the end that sales and exports are integrated with other United States activities and the foreign policy of the United States is best served thereby." Thus, the U.S. Government's role as defined by the Executive Order is greater than that of a conduit, and continued involvement of the government demonstrates that the procurement is intended to serve a governmental purpose.

Notwithstanding the language in the Act and in the Executive Order, IAI argues that the regulatory definition of "govern-

ment purpose" excludes FMS. The protester observes that some of the Greater Rights clause was drawn from the Government Purpose License Rights clause in the Defense Federal Acquisition Regulation Supplement (DFARS), which states:

"Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data for commercial purposes." DFARS § 252.227-7013(a)(14).

IAI points out that the Department of Defense (DOD) has proposed a new definition of "government purpose" that expressly includes FMS:

"Government purpose means any activity in which the U.S. Government is a party, including cooperative agreements with international or multilateral defense organizations, or sales by the U.S. Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display or disclose technical data for commercial purposes or authorize others to do so." 59 Fed. Reg. 31605

IAI argues that the fact that the new proposed definition added FMS to its list of activities that have a government purpose demonstrates that the existing DFARS definition did not encompass FMS as a government purpose.

We disagree. The fact that DOD currently seeks to specifically list FMS as included among government purposes may only reflect a determination to make express that which was previously implied. The current definition cannot be viewed as exhaustive; indeed, it only lists "competitive procurement" and only excludes "commercial purposes." We find nothing in this definition to exclude FMS, and cannot accept IAI's conclusion that the omission of any mention of FMS in the current regulatory language means that FMS is outside the scope of government purpose.

IAI repeatedly insists that when it sold the Greater Rights in the TDP to the U.S. Government, it never intended to permit the U.S. to use the TDP to compete with IAI in foreign markets. However, the U.S. Government is not "competing in foreign markets"; it is seeking to fulfill its FMS commitments through a competitive procurement. More importantly, we must rely on the language of the 1987 contract and the intent of the Act governing FMS, rather than the protester's intent. While we understand the protester's desire to limit the rights to the TDP to FMS procurements involving only transfers from existing U.S. Government

stock, the language of the contract does not express that limitation or otherwise differentiate between FMS sales from existing stock and the U.S. Government's acquisition of goods to fulfill FMS commitments. There is no language in the 1987 contract--or anywhere in the record, except in the protester's arguments--specifying that the U.S. Government is the only permissible end-user for MCBSSs that are produced by using the TDP. In fact, since IAI states that it agreed to allow the U.S. Government to transfer MCBSSs from its own stock to foreign governments, we do not understand its insistence that it intended to restrict the TDP rights to sales where the U.S. Government would be the end user. While IAI apparently intended the Greater Rights clause in the 1987 contract to preclude other contractors from obtaining the use of the TDP to compete against IAI in the global market through sales of MCBSSs to other governments, the language of the Greater Rights clause it agreed to after negotiations did not effectuate its apparent intent.

We conclude that the FMS procurement at issue here is for a government-to-government sale in furtherance of a U.S. Government purpose; that the Greater Rights to the TDP conferred to the U.S. Government by the 1987 contract permit the Army to use the TDP in connection with a governmental purpose; and that the RFP, as proposed, is therefore not legally objectionable.

IAI also protests that the procurement violates the terms of a Memorandum of Understanding (MOU) between the U.S. Government and the Government of Israel for mutual cooperation in research and development and procurement of selected defense equipment. The protester cites the following language from the MOU:

"Technical information, including [TDPs], furnished to the Government or to persons in the other country for the purpose of offering or bidding on, or performing a defense contract shall not be used for any other purpose without the prior agreement of the originating government as well as the prior agreement of those owning or controlling proprietary rights in such technical

²We note in this regard that the non-disclosure/non-use agreement appended to the contract which must be executed by licensees supports our conclusion that the protester understood that the Greater Rights clause covered FMS and that the contract covered use of the TDP for FMS. The agreement states in part that the license is granted to use the data "as required to perform contracts including Government-to-Government Foreign Military Sales procurements between licensee and [U.S. Government]."

information. Each Government will ensure that full protection will be given by its officers, agents, and firms to such proprietary information, or to any privileged, protected or classified data and information they contain.

"In no event shall such technical information or TDPs or products derived therefrom be transferred to any third country or other third party transferee without the prior written consent of the originating Government."

In our view, the language quoted from the MOA refers to technical data that was furnished by one of the two governments that was party to the agreement--as demonstrated by the recurring phrase "the originating government" (not "the originating firm") and "furnished" (not "sold"). Since the TDP rights were not furnished by the Government of Israel "for the purpose of preparing a bid or offer or performing a defense contract," but were instead purchased by the U.S. Government from the contractor for the purpose of enhancing competition, we have no reason to believe this MOA governs this acquisition. No one argues that this is a data exchange between the two governments pursuant to this MOU. The rights to the TDP were sold by IAI, acting as a commercial entity, to the U.S. Government for monetary consideration under the 1987 contract. We therefore conclude that nothing in the MOA prohibits the Army's use of the TDP in the proposed solicitation.

IAI also objects to the Army's decision to set this procurement aside for exclusive small business participation, characterizing that decision as the "purposeful exclusion of IAI from this procurement."

Under the Federal Acquisition Regulation (FAR), an acquisition must be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a fair market price. FAR § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. E.L. Hamm & Assocs., Inc., B-249642, Dec. 8, 1992, 92-2 CPD ¶ 399. The

³Although IAI is owned by the Government of Israel, it entered the 1987 contract as a corporation acting in its own commercial interest. The Government of Israel was not a party to the 1987 contract. In its protest, IAI asserts that the TDP was "developed exclusively at private expense."

agency must make reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capabilities to perform the work; the use of any particular method of assessing the availability of small businesses is not required so long as the agency makes reasonable efforts to locate responsible small business competitors. See id. Factors such as prior procurement history, market surveys, and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer to decide whether or not to set aside a procurement. American Cyanamid Co., B-230044 et al., Apr. 7, 1988, 88-1 CPD ¶ 350.

Here, the contracting officer reasoned that because four of the five firms that had competed under the most recent procurement of this item had been small business concerns, he was required to set this procurement aside. We agree.

IAI points out that the FAR provision governing set asides also states that "[a]lthough past acquisition history of the item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists," and argues that a set-aside determination that is based solely on past acquisition history is therefore improper. However, the cited FAR provision does not preclude reliance on past procurement history where the prior procurement experience provides such strong support for an expectation of continued small business participation. In addition, the record shows that each of the small businesses that competed under the 1990 procurement have requested the current RFP and intend to submit offers. In these circumstances, we think the requirement to conduct the procurement as a small business set-aside was clear.

The protest is denied.

\s/ Ronald Berger
for Robert P. Murphy
General Counsel